SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 431

THE PUSEY AND JONES COMPANY
(a corporation)
Petitioner

against

HANS KARLUFF HANSSEN
Respondent

and

JACOB PREBENSEN, Jr., H. KJERSHOW, HARRY BORTHEN, A/S TROMP, A/S MARITIM, A/S HAUG, A/S MERCATOR, A/S SORLANDSKE LLOYD, and E. & N. CHR. EVENSEN
Intervenors-Respondents

Reply Brief on Behalf of Petitioner

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PETITIONER'S REPLY BRIEF.

Reply to Respondent's Point I.

In Point I the respondent contends that "the Delaware statute justifies *the procedure* herein and the action of the court below" (p. 5).

I.

But the question is not one of procedure in the State courts, but of jurisdiction in the Federal courts.

We may, however, properly observe, that even from the point of view of procedure, the respondent has not succeeded in showing that the Delaware statute has ever been construed, except in the decisions below, as authorizing a simple contract claimant whose claim is disputed by answer demanding a jury trial, to throw the corporation into a receivership. The respondent has been wholly unable to cite a single decision in Delaware giving to this statute a construction in this respect different from the uniform construction of receivership statutes in other States, as set forth in the Third Point of our Main Brief (p. 33).

Indeed, the respondent admits that he *is* claiming an *exceptional* interpretation, for on page 7 he says:

> "Whatever may be said as to the meaning of the word 'creditor' in other statutes, these and many other decisions leave no question but that in this Delaware statute the term includes unsecured general creditors as well as judgment creditors."

This assertion of an exceptional interpretation for this Delaware statute cannot bear investigation. In every one of the cases cited by the respondent to support it, plaintiff's claim to be a creditor was established by judgment or admission (thus eliminating any issue at law as to his status), or else he was in possession of a foreclosable lien representing an equitable right in itself.

The only Delaware case from which the respondent has ventured to make a quotation is *Sill* v. *Kentucky Coal Co.*, 11 Del., Ch. 93; but at pages 35 and 36 of our Main Brief, we have pointed out the obvious distinction between that case and this.

II.

The respondent argues as if any case holding a receivership bill maintainable by other than a judgment creditor was a decision in his favor. The resultant fallacy lies in overlooking the reason for the rule for which we are contending, to wit, that where the complainant's claim to be a creditor raises on the pleadings an issue of fact, the defendant is entitled under the Constitution of the United States—and, indeed, under the constitution of practically every State—to a trial of this common law issue by a common law court and jury, provided he makes seasonable demand therefor. The reason for this rule fails where the claim is admitted, or a jury trial is waived by failure to demand it, or the complainant has a lien foreclosable in equity, *i. e.*, an equitable demand against property. A judgment is only one of several ways of satisfying the defendant's constitutional right, and hence the reason for the rule (15 *Corpus Juris*, p. 1390).

The Delaware Constitution, like that of every other State, guarantees the perpetuation of jury trials of common law demands. In Section 4 of Article I it provides that: "Trial by jury shall be as heretofore." Because of the prevalence of like guaranties in the constitutions of the various States, we have the uniform rule, pointed out in the Third Point of our Main Brief (p. 33) and apparently conceded by the respondent (p. 7), that the word "creditor" in these receivership statutes does not include one who merely claims to be a creditor, but has not established his claim by judgment or admission. *Hence, the fact that the respondent has been wholly unable to find a single*

decision placing a contrary interpretation on this Delaware statute, renders baseless his assertion that it bears an exceptional interpretation.

III.

Great significance also attaches to *the respondent's assertion that this Delaware statute is not exclusively a liquidation statute* (p. 8).

The respondent expressly declares that under this statute receivers may be appointed by the final decree in the suit, not to wind up the corporate affairs, but to manage it as a going concern "as long as the exigencies of the case may require" (p. 8). In other words, under this statute, says the respondent's brief (p. 8), the Chancellor may by final decree replace the board of directors as the business manager

> "until circumstances indicate that it is proper to turn them back to the directors and stockholders without the adjustment or payment of debts or any distribution whatsoever of property."

That is an exercise of visitorial power.

The respondent is of necessity driven thus to deny that this is a liquidation statute, because his own bill of complaint does not pray for any liquidation of the corporation or any satisfaction of his alleged debt out of its assets.

The respondent, however, has overlooked that his own claim as to the nature of this statute states one of the very reasons why it is not applicable in the Federal courts.

The respondent does not claim that the final appointment of a receiver for any such purpose of mere continuation of the corporate business, independent of any grant of final relief, is within the inherent jurisdiction of a court of equity. Indeed, his own brief asserts that it is not (p. 28):

> "Although there may be isolated cases in which some courts have appointed receivers of corporations solely on the ground of insolvency, they do not represent the almost universal practice of courts of equity on that subject."

And the respondent's brief cites as authoritative the statement (p. 29) in *High on Receivers*, Section 18, that "insolvency will not *of itself* warrant a court in appointing a receiver."

We may take it, therefore, as conceded by both sides that no known head of inherent equity jurisdiction warrants the final appointment of a receiver upon the sole fact that the corporation involved is insolvent. *A fortiori* is this true where, as here, the receivership sought is not for a winding up of a financially dead corporation but for the corporation's indefinite continuance as a going concern, without award of any final relief whatever.

Yet the respondent claims—and the exigencies of his case require him to claim—that this Delaware statute has conferred, even to so extreme an extent, this altogether new and unheard of jurisdiction, not only upon the State Chancellor, but upon the Federal court of equity sitting in Delaware. His brief says (p. 8):

> "That the Court (of Chancery) may proceed (under this statute) *upon the sole fact that the corporation involved is insolvent* is equally well-settled, and in fact is *apparent from the terms of the statute itself*."

Hence, the respondent's own proposition is that a new jurisdiction in equity has been created by statute—a jurisdiction far in excess of any inherent chancery jurisdiction, and one which, so far

as Federal courts are concerned, is peculiar to the Federal court sitting in Delaware. A Federal court sitting in Pennsylvania or sitting in New York can exercise no such jurisdiction. The judges thereof would instantly say that they had never heard of any such jurisdiction—that they could find no grant of it in the Constitution of the United States or the Acts of Congress, which constitute the sole source of Federal jurisdiction in equity.

IV.

But, in still another respect, the respondent's own argument in Point I and elsewhere also emphasizes the very thing for which we are contending, viz.: that the Delaware statute, in the words of Judge Lowell in *Mathews Slate Co.* v. *Mathews*, 148 Fed., 490, 491, is one "enlarging the jurisdiction in equity rather than (merely) giving equitable rights," and hence is not applicable to a federal court in equity.

In the present case, the respondent's brief admits (indeed claims) that under this Delaware statute a receiver may be appointed by final decree merely for the purpose of indefinitely continuing a going business, "upon the sole fact that the corporation involved is insolvent" (p. 8). The respondent also admits (indeed claims) that, save for this statute, such a decree would be contrary to *"the almost universal practice of courts of equity on that subject"* (p. 28).

Yet that is the very test which this Court has laid down for determining whether a state statute permissibly enlarges a merely personal right in a federal court of equity or unpermissibly enlarges the jurisdiction of the federal court itself.

As said by this Court in *Mississippi Mills* v. *Cohn*, 150 U. S., 202, 204:

> "It is well settled that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. * * * The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different States of the Union. * * * That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof."

V.

That this Delaware statute as interpreted by the respondent in his Point I creates a new jurisdiction in the court, is still further emphasized by the respondent's contention that a proceeding under it is *not* "a creditor's bill" as that term is used in equity jurisprudence—and, specifically, that this very suit is *not* a creditor's bill.

Thus, at page 47 the respondent's brief claims that *Scott* v. *Neely* and *Cates* v. *Allen*, do not control this case, because they "involved strictly a creditor's bill," whereas in the present case "no ascertainment of the debt may ever take place," "the debt may never be satisfied," and, as to the procedure, "no such procedure existed previously" (respondent's brief, pp. 48, 49).

Thus, in order to find a loop-hole for distinguishing the *Scott* and *Cates* cases, the respondent denies that either the statute or his own complaint is within so familiar a head of equity jurisdiction

as a creditor's bill (p. 47); and he asserts instead that the statute creates something brand new—brand new in a number of respects:

(1) Brand new, in that it entitles to a final decree for a receiver, a person merely asserting a simple contract claim although by the decree "no ascertainment of the debt may ever take place," and the debt "may never be satisfied" (respondent's brief, pp. 48,49)!

(2) Brand new, in that "no such procedure existed previously" (respondent's brief, p. 49)!

(3) Brand new, in that such a decree is contrary to "the almost universal practice of courts of equity on that subject" *i. e.*, appointment of receivers (respondent's brief, p. 28)!

(4) Brand new, in that heretofore in equity "insolvency will not of itself warrant a court in appointing a receiver" (respondent's brief, p. 29)!

(5) Brand new, in that the final decree to be entered is not one for liquidation or winding up, but for the indefinite continuance of the corporation as a going concern and conduct of its affairs under a receiver as general manager "until circumstances indicate that it is proper to turn them back to the directors and stockholders without the adjustment or payment of debts or any distribution whatsoever of property" (respondent's brief, p. 8)!

That this is a brand new jurisdiction is obvious on the respondent's own analysis of it.

The respondent pays too high a price for the privilege of distinguishing the *Scott* and *Cates* decisions by this Court.

VI.

Finally, an examination of the Delaware statute itself shows that it is in terms the creation of a new jurisdiction. It is true that the statute professes to be "for the benefit of any creditor or stockholder"; but creditors and stockholders, like the poor, we always have with us. What is new about the statute is its grant of powers to the Chancellor. The whole section and the next succeeding section are merely an enumeration of powers for the first time conferred upon the Chancellor.

If, as has been repeatedly held by this Court, the limit of the jurisdiction of the federal courts of equity is the equity jurisdiction exercised by the High Court of Chancery in England, the powers created by this statute cannot be anything but a new jurisdiction.

Reply to Point II.

In his Point II (p. 10) the respondent argues that

> "the appointment of the receivers in this proceeding was well within the discretion of the District Court."

Again we point out that the question is not one of discretion but of jurisdiction. We repeat what we said on pages 59 and 60 of our main brief that the grievance of the Pusey & Jones Company is that, without due jurisdiction and process of law, it has been deprived of the control of its own affairs to the irreparable damage of itself and its estate. The disastrous consequences of the appointment of these receivers are obvious enough. Up to that time, substantially all of the important stock and creditor interests (except this alleged assignee of Hannevig) were united in policy and

the Company was successfully conducting its affairs and was able to continue to do so (Rec., pp. 150, 151, 345-6, 371, 363-5). They had entered into an agreement, dated March 18, 1921, which appears at page 65 of the Record and which was approved and put into effect by order of the District Court for the Southern District of New York entered in the bankruptcy of Hannevig and Hannevig, Inc. (Rec., p. 358). This order stated the purpose of the agreement and of the Court to be as follows (Rec., p. 358):

> "The Court after due deliberation, being of the opinion that the interests of this estate and of all other parties require a prompt, just and equitable disposition of all claims of the Pusey & Jones Corporation against the United States Government and the United States Shipping Board and the Emergency Fleet Corporation, and the Court finding further that the plans proposed to be carried out pursuant to said agreement should accomplish such a disposition of said matters."

Pursuant to this order and the agreement approved thereby, a new board of directors was appointed consisting of representatives of the principal interests; and thus the affairs of the Pusey & Jones Company were placed under the common control of all the principal legitimate interests therein and continued to be so conducted until the appointment of these Delaware receivers disrupted this beneficent plan for the working out of the affairs of the Pusey & Jones Company without a formal receivership.

It is not a little significant that this desirable arrangement was struck down by one who stands in the shoes of Hannevig and who is seeking to take a technical advantage of the assignment in order to avoid the enormous offsets which the corporation has against that fugitive.

Reply to Point III.

It is not a little significant that when the respondent's brief undertakes to argue "the question of the *jurisdiction* of a Federal court to proceed under the Delaware statute," it devotes its initial Point on that subject to alleged grounds of jurisdiction not considered or acted upon by the courts below (p. 12).

I.

The first of these alleged grounds is that "the respondent was a stockholder" (p. 12).

This assertion is rested by the respondent's brief on the statement that "the bill alleges that Hanssen is the owner of 7,200 shares of the preferred stock" of the Company (p. 12).

The respondent seemingly assumes that his mere *claim* to be a stockholder, like his mere claim to be a creditor, in and of itself gives a Federal court of equity jurisdiction under the Delaware statute, if the corporation be in fact insolvent. The respondent entirely ignores the fact that the answer of The Pusey & Jones Company contains the plump denial "that complainant is or ever has been a stockholder of respondent corporation," and the plump denial that these certificates, "were ever transferred or assigned to the complainant" or "ever became his property" or "that he is the holder or owner of said shares of stock" (Rec., pp. 139, 140). His claim to be made a stockholder was left undetermined (Rec., pp. 521, 650) and this Court will not undertake to determine this question.

It is apparent that the refusal to transfer the stock was not an arbitrary one. The endorsements of the certificate, moreover, were not even stamped and were void as a transfer by the law

of New York where the delivery was made to Hanssen.

Other objections to that claim were numerous, and neither of the lower courts was willing to venture its decision on any such uncertain basis.

Hanssen is now asking this Court to accept the unsustained allegation of the bill rather than the fact and thus to substitute a ground of jurisdiction and discretion, on which the orders below were not rested. But this Court is proceeding herein merely as a court of review. It is not hearing an application *de novo* for the appointment of receivers. It is merely reviewing the jurisdiction which the courts below asserted.

As this Court said in *Brown* v. *Fletcher*, 237 U. S., 583, in reversing the orders below (p. 587):

> "As this case is one over which the action of the court below is made final by the statute, we are of opinion that its refusal to decide the case on the merits because of an erroneous conclusion as to want of power as a Federal court to do so ought not under the circumstances here disclosed to be made the basis by which this court would perform a duty which the statute contemplates should be discharged by the court below."

And, again, in *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U. S., 645, this Court said (p. 651):

> "When the merits are heard we will be virtually exerting the powers of a court of first instance, since we will be called upon, not to review the action of a court below, organized conformably to law, but to decide, virtually in the exercise of original jurisdiction, questions which the law contemplated should be previously passed upon by an inferior court lawfully constituted."

To the same effect are:

National Brake Co. v. *Christensen*, 254 U. S., 425, 432;

Meccano, Ltd. v. *Wanamaker*, 253 U. S., 136, 142;

Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S., 257, 267.

The respondent's brief says (p. 17) that even though the courts below did not recognize Hanssen as a stockholder, the discretion which they exercised would not have been affected if his alleged status as a stockholder had been the sole possible ground of jurisdiction.

On the contrary, this would make all the difference in the world. If a corporation is insolvent the preservation of its assets by a receivership for equal distribution among its creditors may be a matter of urgent necessity in the creditor's interest; but seldom, if ever, can a stockholder have any real interest, merely because of its insolvency, in taking the corporation out of the control of its stockholders and placing it in the hands of its creditors. A stockholder applying for a receivership merely because of insolvency is a *rara avis* indeed, where no personal liability is involved. The merely theoretical character of his interest would be bound vitally to affect the court's discretion in appointing a receiver *pendente lite*.

II.

The importance of these considerations is evidenced by the fact that Hanssen's own proof speedily contradicted the allegation of his complaint that the 7,200 shares had been "sold" to him and had become "the property of complainant" (Rec., p. 9). The alleged documents which he himself produced in connection with his rebuttal

affidavit (Rec., p. 482) show that he had no beneficial interest whatever in the certificates but was merely acting under a power of attorney from certain Norwegian interests (Rec., p. 495), which power of attorney gave him no authority to hold the stock, either as owner or pledgee. Under this power of attorney he made, as his rebuttal affidavit alleges, an agreement with Hannevig whereby Hannevig handed to him these shares as security for the payment of Hannevig's obligations to Hanssen's principals; but Hannevig expressly reserved the right to sell "the deposited values" "free from any encumbrances," and for this purpose to have "the deposited values" "delivered" back to him, the sole condition of this reserved right being that he pay his obligations to Hanssen's principals (Rec., p. 489).

Thus, Hanssen and his principals have no right to sell the securities or to transfer them, and his principals could obtain that right only as a result of due foreclosure on the security. There is no proof or allegation that Hannevig has defaulted under this agreement or that his principals have acquired a right to foreclose or have foreclosed.

Obviously, under these alleged papers produced by Hanssen himself, these certificates were and still are the property of Hannevig and Hannevig in no way authorized Hanssen to become the "stockholder" in his place.

Contrast the actual contents of this alleged document with the following assertion in the respondent's brief (Rec., p. 13):

> "It appears from the affidavits that this stock being owned by Hannevig was delivered to Hanssen as collateral security for a large indebtedness; and it was indorsed for transfer. Holding these certificates, Hanssen un-

doubtedly had the right to such a transfer and to the issue to him of new certificates in his name."

The very contrary is the fact, on the face of Hanssen's own papers. Hanssen is not a pledgee at all, but a mere custodian. Not only was he given no right by Hannevig, the owner of the certificates, or by his own principals, to transfer these certificates to his own name, with the consequent facilities for misappropriation and confusion, but the rights which Hannevig expressly reserved were utterly inconsistent with such a right of transfer prior to default and foreclosure. A transfer to Hanssen's name would cut off Hannevig's expressly reserved right of disposition, for his title and power to make delivery would be at the mercy of Hanssen and the stock would become subject to the personal obligations of Hanssen and his principals.

In *Lippman v. Kehoe Stenograph Co.*, 98 Atl. (Del. Ch.), 943, pages 946, 947, it was held:

> "When a stockholder assigns in blank his certificate of stock not having sold the same, and delivers it to another, not a purchaser, but with no intention on the part of the transferor, or of the person to whom the certificate was delivered, that the interest of the transferor in the stock should terminate, and no transfer of the stock has been made on the books of the company, the stockholder does not thereby cease to be the owner of the stock in his own right, or disqualified to be a director of the company. * * *
>
> "An assignment in blank may, or may not, terminate the interest of the assignor in the stock, depending on the purpose with which it was done, and no authority is cited to the contrary."

Under the Delaware statute set forth on page 57 of our Main Brief, a pledgee of stock may not vote thereon unless the pledgor has expressly authorized him to do so. There is no proof here that Hannevig has ever given Hanssen that power.

In *Spreckels* v. *Nevada Bank*, 113 Calif., 272, there was involved a statute of California somewhat similar to the statute of Delaware set forth on page 56 of our Main Brief, which provides that "whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer." It was held, to quote the headnote:

> "A pledgee of the stock of a corporation, when the contract is silent upon the subject, has no right to have the stock transferred to his name before maturity of the debt; and an injunction will lie at suit of the pledgor to prevent such transfer. A transfer of stock upon the books of the corporation is not essential to the creation of a valid pledge of the stock, but the pledgee has the right to cause a proper entry of the transaction between himself and his pledgor to be entered upon the books of the corporation for his protection, under section 324 of the Civil Code, though he is not authorized to divest the pledgor of the rights incident to his ownership of the pledge, by surrender and cancellation of the pledged certificate, and the issuance of a new certificate in the name of the pledgee."

Even in states where there is no statute similar to that of Delaware preventing a pledgee from having an absolute transfer on the books of the corporation, the pledgee is not entitled to a transfer of the stock to his own name, even though it was indorsed in blank when pledged, *where there*

is anything in the agreement of pledge which is inconsistent with thus depriving the pledgor of ownership of record or of the power of disposition (14 *Corpus Juris*, 726).

III.

The respondent's further argument that even if Hanssen was not entitled to become a stockholder of record, he was, nevertheless, a "stockholder" within the meaning of this Delaware statute, is merely a gratuitous assumption.

This statute is extraordinarily drastic and a most unprecedented innovation upon the common law. It is inconceivable that merely because one stockholder out of many has pledged his stock, the pledgee may throw the corporation into a receiv-
ership of indefinite duration, irrespective of the wishes of the actual stockholders. Such an inter-
pretation of the statute would unsettle the security of all investments in Delaware corporations, and would throw open the door to undreamed of abuses and machinations.

The cases cited by the respondent are merely to the effect that delivery of a certificate of stock indorsed in blank passes title as between the par-
ties when delivered with that intention. But the question here is not between Hanssen and Hannevig, but between Hanssen and the cor-
poration; and the respondent's very concession (p. 14) that until a transfer upon the books the corporation does not lose any lien which it may have against the stock in the transferor's hands, shows that as regards the corporation a mere de-
livery of certificates indorsed in blank does not change the transferor's status as *the* stockholder.

The cases of *Reinhardt* v. *Interstate Telephone Co.*, 71 N. J. Eq., 70, and *O'Grady* v. *United States*

Telephone Co., 71 Atl., 1040, are not in point because there the complainant was the full owner of the stock—not merely a custodian or pledgee; and his right to a transfer was not questioned.

Cases merely dealing with the right of a pledgee of stock to protect the value of his security as against misappropriation of corporate funds, are not in point. The question here is solely whether Hanssen is a "stockholder" within the Delaware statute—not whether he has certain remedies to protect the value of the collateral in the event of a misappropriation of the corporation's assets.

IV.

Finally, no case has been cited by the respondent, and we can find none, holding that a stockholder has the right to apply to a Federal court in equity for the appointment of a receiver, not for the final relief of liquidation, but solely (to quote the Respondent's Brief, p. 8) "until it is proper to turn them (the assets) back to the directors and stockholders without the adjustment or payment of debts or any distribution whatsoever of property." This is the nature and object of Hanssen's bill, as defined and asserted by himself (see his Points I and IV).

As shown on pages 37-41 of our Main Brief, no Federal court in equity has, or can be given by State legislation, jurisdiction to entertain a bill which seeks merely to secure a receivership for its own sake.

In *Jacobs* v. *Mexican Sugar Co.*, 130 Fed., 589, the principal case cited by the respondent, the object of the bill, as disclosed in the sentence of the opinion immediately succeeding that quoted by the respondent, was that the Court should "decree

the dissolution of the corporation and to wind up its affairs." So, likewise, in *Darragh* v. *Wetter Mfg. Co.*, 78 Fed., 7, and in *Kessler* v. *Wm. Necker, Inc.*, 258 Fed., 654, the objects of the bills were to secure dissolution, liquidation and distribution.

Jurisdiction for such a purpose falls under a well-known head of equity jurisdiction, for, as said in *Graham* v. *Railroad*, 102 U. S., 148, "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors." But this is a far cry from a case where the object of the bill is not to declare the corporation civilly dead, but to continue it indefinitely as a live and going concern under the control of a receiver rather than of the board of directors.

V.

The further claim that the jurisdiction of the courts below can be upheld because the United States Shipping Board Emergency Fleet Corporation was allowed to intervene, is without any possible merit.

It has already been briefly answered on pages 5 and 6 of our Main Brief.

The respondent overlooks the fact that the intervention of the Shipping Board did not occur *until two months after the entry of the decree* of the District Court and after the transcript had been filed with the Circuit Court of Appeals. The decree appealed from was filed August 1, 1921 (Rec., p. 603); the petition for appeal and the order allowing appeal were filed August 22, 1921; the transcript of the record was certified and filed on September 30, 1921, and citation issued September 1, 1921 (Rec., pp. 617, 626, 620); but the Shipping

Board's petition for leave to intervene was not presented until October 8, 1921 (Rec., pp. 632, 626), and the order allowing intervention was dated October 8, 1921, and was not entered and conferred no right *nunc pro tunc* (Rec., p. 635).

No reference to the Shipping Board appears in the decision of the Circuit Court of Appeals (Rec., p. 637) or in its mandate (Rec., p. 653); and its opinion contains no reference to the Board's intervention.

The respondent argues that in a class action, "if the original complainant cannot qualify, the proceedings are perfected by the intervention of one of the prescribed class who can qualify" (p. 21). However this may be, it has no application to a case where such intervention occurs *after* the entry of the decree and of the order allowing appeal therefrom and after filing the transcript on appeal (*Foster Federal Practice*, 6th Ed., Vol. IV, p. 3836). The validity of the decree must rest on the jurisdiction existing when it was entered; and the order allowing the appeal transferred the case to the Circuit Court of Appeals. Intervention thereafter could add nothing to the validity of the decree.

In *Mail Co.* v. *Flanders*, 12 Wallace, U. S., 130, it was held (p. 135):

> *"Where the court is without jurisdiction it is in general irregular to make any order in the cause except to dismiss the suit."*

In *Elliott* v. *Peirsol*, 1 Peters, 328, it was held (p. 340):

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is

regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as *nullities. They are not voidable, but simply void.*"

In Third Street & Suburban Ry. v. *Lewis*, 173 U. S., 457, it was held, *per* Chief Justice Fuller (p. 460):

> "*If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed;* and lack of jurisdiction cannot be supplied by anything set up by way of defense."

In *Dickinson* v. *Consolidated Traction Co.*, 114 Fed., 232; affirmed 119 Fed., C. C. A., 871, certiorari denied 191 U. S., 567, it is stated (p. 242):

> "*This court cannot permit a bill to be amended in a case over which it has no jurisdiction. Jurisdiction must affirmatively appear at every stage of the case.*"

Reply to Point IV.

I.

The respondent presents an argument *in terrorem* that the consequence of determining lack of jurisdiction in this case will be serious, because the State and Federal courts of Delaware "for decades have undertaken to proceed under this statute in the administration of the affairs of insolvent corporations organized in the State of Delaware."

For reasons already stated, we fail to see that any of those decisions would be adversely affected by upholding the point now made by this defendant. But whether this be so or not, this Court will not overlook the serious consequences of opening a way to break up the uniformity of Federal

equity jurisdiction throughout the United States and to circumvent the constitutional line of demarcation therein between legal and equitable demands.

At page 45 the respondent's brief says:

> "He (Hanssen) could have proceeded to procure a judgment for a large amount against the defendant corporation, and have called upon the sheriff to levy upon any property that could be found."

What more complete demonstration do we need that the plaintiff's fundamental demand is merely pecuniary, constituting a familiar cause of action at law; and that his choice of forum represents merely a choice between methods of collection?

If a State can enlarge the jurisdiction of a Federal court in equity, by creating new rights in the plaintiff, it can also diminish that court's jurisdiction by creating new rights in the defendant. Heretofore this has not been deemed permissible.

> *Payne* v. *Hook*, 7 Wall, 425, 430;
> *McConichay* v. *Wright*, 121 U. S., 201, 205.

The respondent argues that the State Legislature has created a new right in the complainant. Even so, it would not follow that thereby the State Legislature could take away an old right which the Constitution of the United States and the Acts of Congress have guaranteed to a defendant in a Federal court of equity.

The respondent dwells on the imagined hardship to himself. The court must also consider the hardship upon the great body of genuine creditors and stockholders who oppose this receivership and whose rights are represented by the cor-

poration. Chief among those rights is the guaranty of the United States Constitution that in a Federal court their corporation shall not be taken out of the hands of their appointed representatives, on the mere say-so of one claiming to be a simple contract creditor, without a jury trial of his claim.

II.

The respondent claims that the Delaware statute has created a new right.

If that be true, it still would not follow that the statute has not also created a new jurisdiction. Indeed, the creation of a correspondingly new jurisdiction would be the presumption.

It also does not follow that, merely because the right is new, the possessor of it can enforce it in a Federal court of equity in Delaware. It still is necessary to examine the nature and content of this alleged new right and of the corresponding jurisdiction which it imports.

We have already made this analysis in our reply to Point I of the respondent's brief; and any extended repetition here is unnecessary.

Before such an alleged new right can be enforced in a Federal court of equity in Delaware, the following conditions must be met:

1. The exercise of the new right must be consonant with the old rights of the defendant under the fundamental law governing the Federal court, to wit: the Constitution of the United States and the Acts of Congress in execution thereof.

2. The line of demarcation in the Federal courts between law and equity cannot be obliterated by converting a common law

pecuniary demand into a new equitable right or by adding to it a new equitable remedy.

3. The uniformity of Federal equity jurisdiction throughout the different States of the Union cannot be broken in upon by State legislation, purporting to confer upon the State courts a new head of equity jurisdiction.

4. Under the Constitution of the United States and the Acts of Congress in execution thereof, the equity jurisdiction conferred on the Federal courts is only that which the High Courts of Chancery in England possessed when the Constitution took effect. That jurisdiction may be neither enlarged nor diminished by State legislation.

Any State legislation which creates a new right overstepping these limitations necessarily works, when applied to a Federal court, an unpermissible enlargement of jurisdiction.

III.

Under his Point IV, the respondent denies that this is a creditor's bill (p. 47). He himself asserts that the final decree which his suit seeks, is contrary to "the almost universal practice of courts of equity on that subject"; *i. e.*, on the appointment of receivers (p. 28). He himself contends that, until this statute, the Federal court in Delaware had no power to entertain a bill for "a receivership upon the sole ground of insolvency" (p. 29). He himself defines his bill as seeking, not final relief by way of liquidating a financially deceased corporation, but rather a final decree merely substituting indefinitely a receiver for the board of directors as the general manager of a going business concern "until circumstances indicate that it is proper to turn them (the assets) back to the directors and stockholders without the adjustment or payment of debts or any distribution whatso-

ever of property" (p. 8). He himself claims that just such a decree is contemplated by this Delaware statute (p. 9); and that "the Delaware statute *enlarges the jurisdiction* of the Courts of Chancery over the appointment of receivers of corporations," so as to permit the entertainment of a bill for so anomalous a decree (p. 8). And finally, in the effort to distinguish the *Scott* and *Cates* decisions by this Court, he says (p. 48):

> "The Mississippi statute there involved, and the Delaware statute involved in this proceeding are principally remarkable for their dissimilarity. There the provision is for the administration of the property of an insolvent corporation; there a judgment for the amount of the debt was to ensue, *here no ascertainment of the debt may ever take place;* there the debt was to be satisfied out of specific property, *here the debt may never be satisfied;* there the procedure was from time immemorial fixed, *here no such procedure existed previously.*"

Comment seems scarcely necessary. Surely a Federal court of equity must enlarge its jurisdiction beyond all known limits if it is to entertain a bill brought by one who merely says he is a creditor, and solely for the appointment of a receiver to continue a going business in place of the corporation's board of directors, and on the distinct understanding that "no ascertainment of the (alleged) debt may ever take place," "that the (alleged) debt may never be satisfied," and that by a procedure which never "existed previously" the suit will reach a decree which does "not represent the almost universal practice of courts of equity on that subject" (p. 28)!

We need not dwell on how disastrous such a

new jurisdiction would be to the rights of the corporation and of genuine creditors and stockholders under the Constitution of the United States and otherwise; or how it would throw open the door wide to improper and oppressive suits, and place a premium on ulterior and predatory motives.

IV.

The cases cited by the respondent under his Point IV hold nothing at all against our contention. Some of them have already been distinguishd in our Main Brief at pages 18-23. Of the others we make the following observations:

Wheeler v. Walton & Whann Co., 64 Fed., 664, bears on the point in no way. Receivers had previously been appointed for an insolvent corporation; but at whose instance, under what circumstances, and for what objects do not appear.

Maxwell v. Wilmington Dental Mfg. Co., 82 Fed., 214, is equally meaningless in this connection. It simply involved the amount of the receiver's compensation.

Hitner v. Diamond State Steel Co., 176 Fed., 384, touches this subject in no way. The only thing involved was the distribution of assets. So far as appears, the prior appointment of receivers had been on grounds recognized from time immemorial as within elementary jurisdiction.

Adler v. Campeche Laguna Corp., 257 Fed., 789, was not a suit by a creditor at all.

Spackman v. Swan Creek Co., 274 Fed., 107, was not a suit by a creditor at all.

We do not know how the respondent's counsel can justify even to himself the citing of these cases immediately after the statement that (p. 31):

"Oftentimes despite objections based upon

the same contentions that are now made by the petitioner, the District Court of the United States for the District of Delaware has for years proceeded to enforce the statute in question upon the principles above laid down."

V.

Elsewhere in his brief the respondent says, "Many Circuit Courts of Appeal have upheld similar statutes" (p. 37).

But the question is not as to upholding the statute, but as to a Federal court exercising jurisdiction under it in circumstances like the present.

The *Darragh* and *McGraw* cases we have already distinguished on pages 18 and 22, respectively, of our Main Brief. Of the *McGraw* case we add these additional grounds of distinction, to wit: That the New Jersey statute there involved is one which on its face contemplated solely the liquidation and winding up of the affairs of the corporation, and the bill of complaint sought that relief. From time immemorial a court of equity has had general jurisdiction to wind up and bury a financially dead corporation. Furthermore, in that case the defendant had admitted the allegations of the bill of complaint on which the receiver had been appointed.

In *Land Title & Trust Co.* v. *Asphalt Co.*, 127 Fed., 1, the complainant was a trust company holding a general mortgage on the defendant's property. The plaintiff therefore had an equitable right to start with—to wit, its right of foreclosure. The enlargement of the incidents of such an equitable right by state legislation presents no question analogous to that here.

In *Kessler* v. *Wm. Necker, Inc.*, 258 Fed., 654,

the complainants were stockholders; the bill sought a final liquidation and winding up; and its allegations were admitted by the answer.

Reply to Respondent's Point V.

I.

This entire Point in the respondent's brief is irrelevant.

The defendant's answer expressly denies that Hanssen is a creditor in any sum whatever or that he is the owner of the notes or that there is any sum due upon them. It denies every claim and equity asserted by him and sets up various cross-demands (Rec., pp. 140 *et seq.*).

The issues thus raised must be ultimately tried. The respondent claims that those issues are properly presentable and triable in this action in a Federal court of equity, because of the Delaware statute. The defendant claims that they are not. Hence, to say that the statute is applicable because "Hanssen *is* a creditor of the petitioner corporation," is to beg this question. The respondent's brief proceeds in a circle. It argues, in effect, that the court has jurisdiction to determine that he is a creditor because he is a creditor.

Furthermore, the so-called evidence that Hanssen is a creditor is simply his own *ex parte* statements, not yet subjected to any cross examination, and certain alleged documents which he has produced, the authenticity, completeness and efficacy of which the defendant not only does not admit but has put in issue by its answer (Rec., pp. 140, 148).

For example, to illustrate the extent to which these *ex parte* statements of Hanssen are chal-

lenged, we refer to the affidavit of Hartwell Cabell, a director of the Pusey & Jones Company and a representative of the Superintendent of Insurance of the State of New York, wherein he says that on February 28, 1921, he learned from the Superintendent of Insurance that three insurance companies appeared on the books of Hannevig & Co., Inc., (Hannevig's *alter ego*), as depsoitors in the sum of about $1,700,000; that these deposits had been secured by Hannevig by various assignments of stocks and securities; and that (Rec., p. 344):

> "These assignments had been made at various dates. Amongst such assignments one appeared under date of October 14, 1920, whereby certificates Nos. 4, 10 and 18 of The Pusey and Jones Company, representing respectively, 5,000, 2,000 and 200 shares of the preferred stock of said company, were transferred and assigned to the three said insurance companies, together with nine promissory notes of The Pusey and Jones Company, amounting in the aggregate to $650,000, said assignments being subject to a prior pledge of said stock and notes to one, Karluf Hanssen, a Norwegian citizen. I attach hereto a copy of said assignment and the papers thereto attached, making them a part of this affidavit, the same being marked 'Exhibit A.' According to my information the property covered by this assignment is the identical property, both as to stock and notes, which is alleged in the bill of complaint herein as belonging to the complainant."

Obviously, if these statements are true, then Hanssen's *ex parte* statements are not true, and at best he would be but the representative of a pledgee of Hannevig's alleged equity in these securities.

These facts all show that Hanssen's claim to be

a creditor presents an issue to be tried. Hence, the question before this Court is whether that issue can be tried in this suit.

II

Furthermore, the respondent ignores the fact that he himself has sued in equity and hence must accept the burdens of the doctrine of equitable set-off. He has sued in equity in order that his own claim should not be judged by the common law and yet he insists that the defendant's claim shall be so judged.

The facts bring this case fully within the equitable doctrines of set-off. The nine notes are dated, respectively, in August, September and October, 1917. The last one for $300,000 was drawn to the order of Christoffer Hannevig personally and was endorsed by him in blank. The other five were drawn to the order of Christoffer Hannevig, Inc., and were endorsed by Hannevig in blank as president of the corporation (Rec., pp. 33-42).

The respondent claims that as to these five notes the maker (the Pusey & Jones Company) has no set-off against him because Hannevig was only an intermediate party (p. 56); but the respondent overlooks that Hannevig, Inc., was merely the *alter ego* of Hannevig since Hannevig owned the majority of its stock and was its president and was conducting a banking business in its name (Rec., p. 132, 112). We cannot find among the complainant's affidavits any denial of this allegation in the defendant's answer (Rec., p. 147):

> "That eight of the nine notes, aggregating $350,000, which run to Christoffer Hannevig, Inc., were really notes held and made to it as the representative of said Christoffer Han-

nevig and taken by said Christoffer Hannevig, Inc., for said Christoffer Hannevig, and after execution thereof and prior to the 17th of September, 1917, the same were delivered by said Christoffer Hannevig, Inc., to said Christoffer Hannevig and were held by him individually continuously from 1917 until he delivered the same to the complainant in February, 1920, and that he was the real owner of the said notes."

Mr. James Baird Simpson, who was the confidential secretary of Hannevig (Rec., p. 438) makes an uncontradicted affidavit to the effect that the money advanced to the Pusey & Jones Company and represented by the notes to the order of Hannevig, Inc., was actually the money of Hannevig personally and advanced by him (Rec., pp. 442-3); that they were endorsed by Hannevig Inc., to Hannevig individually in 1917 and remained in his possession until February, 1920 (Rec., p. 445).

Furthermore, Hannevig deposited with Hannevig, Inc., (*i. e.*, his own banking house, Rec., p. 412), the $750,000 which he had received from the Baltimore Dry Docks Company for the Pusey & Jones Company as the first payment on the purchase of its plant at Gloucester (Rec., p. 144, 412). No consideration was paid by Hannevig, Inc., for this deposit; and hence the Pusey & Jones Company has as much of a claim therefor against Hannevig, Inc., as against Hannevig himself.

Moreover, a court of equity is always capable of looking through the fiction of corporate entity whenever it is necessary to do so in order to prevent fraud and to effectuate justice. As said in *Quaid* v. *Ratkowski*, 183 A. D., 428 (affirmed 224 N. Y., 624), on the authority of a number of decisions by this Court (p. 432):

"While the courts of law strictly observe the fiction of corporate entity, there has been for years a growing indisposition to permit corporate entity to be employed either as an instrumentality or as a cloak for fraud or for successful evasion of the law. (McCaskill Co. *v.* United States, 216 U. S., 504; Westinghouse Electric & Mfg. Co. *v.* Allis-Chalmers Co., 176 Fed. Rep., 362; Linn & Lane Timber Co. *v.* United States, 196 *id.*, 593; United States *v.* Lehigh Valley R. R. Co., 220 U. S., 257, 271; Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 *id.*, 498, 523.)"

The important fact, therefore, appears that the misappropriation by Hannevig and his alter ego Hannevig, Inc., occurred on February 11, 1920 (Rec., pp. 375, 412), *i. e., before Hannevig delivered these notes to Hanssen* according to the alleged deposit agreement by which Hanssen claims to have received them (Rec., pp. 485, 489).

Hence the right of equitable set-off accrued as between the Pusey & Jones Company on the one hand, and Hannevig and Hannevig, Inc., on the other hand, *before* the transfer of these notes to Hanssen. At the time of that transfer neither Hannevig nor Hannevig, Inc., could have collected a nickel on those notes from the Pusey & Jones Company.

Furthermore, *and equally important on the question of equitable set-off*, is the fact that Hannevig and Hannevig, Inc., were at the time of the institution of this suit insolvent and adjudicated bankrupts (Rec., pp. 408, 437).

Consequently, since Hanssen claims that he is in equity because of having no adequate remedy at law (see his Brief, p. 45), he cannot deny the right of the Pusey & Jones Company to have its

cross-demand against Hannevig and Hannevig, Inc., considered as an equitable set-off in light of the fact that both Hannevig and Hannevig, Inc., were adjudicated bankrupts in February and March, 1921, respectively (Rec., pp. 408, 437).

Consequently, the defendant has in this equity suit a right of equitable set-off, for a variety of reasons:

(1) The notes had passed their maturity when Hanssen claims to have received them. His own alleged agreement with Hannevig shows that fact (Rec., p. 490); his brief concedes it (Rec., p. 52); his complaint asserts it Rec., pp. 10-13); and such was the fact (Rec., pp. 369-371, 145).

(2) At the time of the alleged pledge of these notes with Hanssen on February 13th, 1920, Hannevig was in fact insolvent by reason of his misappropriation of the $750,000 received for the Pusey & Jones Company from the Baltimore Drydocks Company, and the pledge with Hanssen was made with intent to prefer certain creditors, as the defendant was entitled to show under its answer (Rec., pp. 145-9).

(3) Both Hannevig and Hannevig, Inc., were not only insolvent but adjudicated bankrupts at the time of the commencement of this suit (Rec., pp. 408, 437).

(4) The cross-demand accrued before the notes were delivered to Hanssen.

(5) Hanssen is not the absolute transferee of these notes. He now only claims to be a pledgee. Ownership of the notes, subject to the pledge, is still in Hannevig (Rec., p. 489). In the instrument of pledge Hannevig admits liability to Hanssen's principals only for $565,-

875; whereas the notes aggregate $650,000, and the pledge is further secured by 7,200 shares of the preferred stock and 3,160 shares of the common stock of the Pusey & Jones Company. By a letter dated March 24, 1920, and never objected to by Hanssen, the exact amount of this indebtedness was apparently fixed at $714,980 (Rec., pp. 458, 451). Hanssen is suing on these notes in the interest of Hannevig as well as of himself. If collected in full as a result of the suit, Hannevig may realize a large surplus either directly or indirectly by lifting the lien of the pledge from his stock. If the notes fail of collection, Hannevig's personal liability to Hanssen's principal for a deficiency will be increased accordingly.

The fundamental principle which the respondent has overlooked was thus stated by this Court in *Scott* v. *Armstrong*, 146 U. S., 499, 507:

> "The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject."

In accordance with this principle, the rule that at law the maker of negotiable paper can offset against the assignee of the payee only a cross-demand originating in the transaction out of which the paper itself issued, has no application where the assignee of the payee is suing in equity, the payee is insolvent, and the notes were overdue when transferred or the cross-demand originated before the transfer.

We have cited a number of cases to this effect on pages 52 and 53 of our main brief. Others may readily be multiplied:

In the Federal jurisdiction we cite *Schuler* v.

Israel, 120 U. S., 506, 510; and *Grant* v. *Fletcher*, 283 Fed., 243, 261.

In *Favorite* v. *Lord*, 35 Ill., 142, it was held (p. 149):

> "But where the case is not within the statute, the defendant, who is the holder of the cross demand, may, in case of insolvency, have a setoff in equity. In such a proceeding he can have the cross demand fully adjusted, and the assignee of an overdue note from an insolvent takes it subject to this equity."

In *Wray's Administrators* v. *Furniss*, 27 Ala., 471, it was held that the maker of a negotiable note might set-off against the assignee thereof a cross-demand against the payee growing out of a collateral transaction where the payee was dead and his estate was insolvent. Indeed, this doctrine was applied even though the cross-demand was for unliquidated damages. To quote the opinion (p. 478):

> "These damages are unliquidated, and could not, ordinarily, be the subject of set-off, either in a court of law or equity. But it is insisted in the case before us, that an equity attaches to have the set-off allowed by reason of the insolvency of Slatter's estate. * * * The equitable right of set-off is given by the insolvency of Slatter's estate. But for this, so far as regards the demand held by Furniss, which is independent of the demand accruing upon the breach of the warranty, there would exist no equitable right of set-off."

In *Indiana Novelty Mfg. Co.*, 15 Ind., App. 1, it was held (to quote the headnote):

> "In an action on a note given in payment of stock in a private corporation, by the assignee of the note, the note having been assigned as

> collateral security for a debt past due and unpaid, and the assignor having become insolvent, the maker of the note, who is a stockholder and officer of the assignor company, has the right to set up a counterclaim or set-off as a defense to the note, an obligation running from him to the assignor."

In *Dubreuil* v. *Gaither*, 98 Md., 541, the receiver of a bank filed a bill in equity alleging that a sum of money deposited in the bank in the name of a certain person as trustee, was really owned by parties who were indebted to the bank; that the trustee had brought suit against the receiver and had recovered a judgment for the amount of the deposit because the court of law had refused to allow the claim of the bank against the real owners of deposit to be used as a set-off. The bill prayed that this set-off be established in equity and that the execution of the judgment be restrained. The Court granted the relief prayed, and said (p. 541):

> "Equity in allowing set-off will usually observe the same principles as courts of law, but it is not limited by the technical rules which restrain those tribunals in dealing with this statutory defense. It 'exercises an original jurisdiction over the subject and will, when reason and justice require it, enforce a counterclaim though not within the letter of the statute.' *Colton* v. *Drover's Bldg. Assn., supra* (90 Md., 93); *Levy* v. *Steinbach*, 43 Md., 203; *Manning* v. *Thruston*, 59 Md., 228; *Smith* v. *Donnell*, 9 Gill., 84. One of the grounds most frequently held by courts of equity to be sufficient to induce them to allow a set-off is the insolvency of the party against whom it is claimed. *Marshall* v. *Cooper*, 43 Md., 60; *Smith* v. *Donnell*, 9 Gill., 89; *Scott* v. *Scott*, 17

Md., 91. That ground exists in the present case according to the undenied allegations of the bill."

In *Baker* v. *Kinsey*, 41 Ohio St., 403, it was held (to quote the headnote):

> "The maker of a separate note, in suit, who holds an overdue joint note made by the plaintiff and another who are both insolvent, may, in equity, set-off the joint demand. The holder of a promissory note who took it after maturity holds it subject to every objection, including equitable set-off, to which it was subject in the hands of his assignor."

To the same effect are:

Sanborn *v. Little*, 3 N. H., 539;
Merchants' Exchange Bank *v.* Fuldner, 92 Wisc., 415;
Wilbur *v.* Jeep, 37 Nebr., 604;
McKenna *v.* Kirkwood, 50 Mich., 544;
Craighead *v.* Swartz, 219 Pa. St., 149, 154.

The same principle obtains in Delaware. In *Burten* v. *Willen*, 6 Del. Ch., 129, it was said (p. 129):

> "Courts of equity will sometimes allow a set-off on account of insolvency, when otherwise they would not interfere."

The cases cited in the respondent's brief at pages 54 and 55 have no application. They were suits *at law*. At law the right of set-off is not recognized at all, except as conferred by statute.

III.

Another and equally well-settled principle leads to the same result.

These notes, when passed to Hanssen, had not only passed their maturity, *but they had lost their negotiability.*

As early as 1917, there had been endorsed on each of these notes, as appears on the face of the copies annexed to the bill of complaint, the words,

> "Extended according to letter dated September 18, 1917, to U. S. Shipping Board Emergency Fleet Corporation.
>
> (Signed) CHRISTOFFER HANNEVIG, INC.
> FINN HANNEVIG,
> Vice-President."

The note for $300,000 to the order of Christoffer Hannevig individually was similarly annotated (Rec., pp. 41, 2). Under each annotation the endorsement in blank of the payee appears (Rec., pp. 33-41).

The letter thus referred to appears at page 370 and constituted an agreement between the Pusey & Jones Company, the Shipping Board and Hannevig, that the maturity of these notes be postponed until the completion of certain vessels. It also contains financial arrangements other than the mere extension of the notes.

If the special undertakings contained in this letter had been incorporated in the original notes when made, they would not even then have been negotiable paper: (1) because an instrument which contains an order or promise in addition to the payment of money is not negotiable; and (2) because an instrument is not negotiable which is payable neither on demand nor at a determinable future time. In the present case, the contingencies expressed in this letter were uncertain and might never happen. (*Nunez* v. *Dautel*, 19 Wall., 560, 562.)

The incorporation of such a special contract and contingency into these notes after their making, destroyed their negotiability from that time.

> Cedar Rapids Nat. Bank *v.* Weber, 164 N. W., 223; L. R. Ann, 1918 A, p. 432;
> Palmer *v.* Bank of Graetinger, 130 Iowa, 469;
> Citizens National Bank *v.* Piollet, 126 Pa., 194;
> Second National Bank *v.* Wheeler, 75 Mich., 546;
> First National Bank *v.* Carson, 60 Mich., 432;
> Miller *v.* Poage, 56 Iowa, 96.

Consequently, since the notes were not negotiable when Hanssen received them, and since Hannevig and Hannevig, Inc., went into bankruptcy before the institution of this suit, the defendant may in equity set-off its claim against Hanssen. Particularly would this be true, should the defendant succeed in showing that when Hanssen received the notes Hannevig was even then insolvent.

In 34 *Cyc.*, the rule is stated (p. 751):

> "As a general rule an equitable right of set-off is not defeated by assignment of the debt. * * * The insolvency of the assignor at the time of assignment is good ground in equity to authorize a set-off against the assignee of claims against the assignor at the time of assignment. * * * In equity, upon proof of the non-residence or insolvency of the assignor at the time of the assignment, it has been held that even an liquidated claim sounding in tort may be set-off against the assignee.

To the same effect is

> *Hamilton* v. *Grangers Life & Health Ins. Co.*, 65 Georgia, 750.